IN THE

SUPREME COURT OF THE UNITED STATES

_____TERM, 197____

NO. 78-977

JAMES R. ABNEY, JR.,

PETITIONER

VS

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Laredo, Texas 78040
Attorneys for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

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NO. _____

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JAMES R. ABNEY, JR.,

PETITIONER

VS

UNITED STATES OF AMERICA

_____

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

_____

The petitioner, James R. Abney, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the



United States Court of Appeals for the Fifth Circuit entered in this proceeding on October 26, 1978, and to the order of that Court dated November 22, 1978, denying the Petitioner's Petition for Rehearing.

## OPINIONS BELOW

The judgment of the Court of Appeals for the Fifth Circuit affirming the decision of the District Court, appears at Appendix p. 1-2. The order of that Court denying the Petition for Rehearing appears at Appendix pages 3-4. These have not been reported as of this date.

## JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit (App. 1 ), was entered on October 26, 1978. A timely petition for rehearing was denied on November 22, 1978.

The jurisdiction of this Court is invoked under 28 USC Section 1254 (1).

## QUESTIONS PRESENTED FOR REVIEW

1. Did the Trial Court err in refusing to allow the Petitioner to file his Motion for Discovery on November 28, 1977?

2. Did the Trial Court err in refusing to allow the petitioner to file his Motion for Bill of Particulars on November 28, 1977?

3. Did the Trial Court err in denying the oral motion for continuance made by the Petitioner on November 28, 1977?



4. Did the Trial Court err in requiring the Petitioner to select a jury on November 28, 1977, when the taking of testimony would not start until January 9, 1978?

5. Did the Trial Court err in refusing to permit the Petitioner to ask voir dire questions of the jury panel on January 9, 1978, and before the taking of testimony?

6. Did the Trial Court err in denying Petitioner's Motion to dismiss on January 9, 1978?

7. Did the Trial Court err in forcing the Petitioner to proceed with the trial on January 9, 1978?

8. Did the Trial Court err in refusing to permit the Petitioner to cross-examine the government witness, Robert H. Boysen, regarding his conversation with Petitioner's counsel?

9. Did the Trial Court err in refusing to permit the Petitioner to cross-examine the government witness, Robert H. Boysen, regarding the reliability and credibility of the employees of Union Carbide Corporation and the Corporation itself?

10. Did the Trial Court err in permitting the government witness, Marsh, over objection of the Petitioner, to testify as to matters which were purely hearsay?

11. Did the Trial Court err in permitting the government witness, Hostacky, over objection of the Petitioner, to testify as to matters which were purely hearsay?

12. Did the Trial Court err in finding that the chain of custody of the government's evidence was properly established?

13. Did the United States Attorney commit



error in falsely stating to the Court that the Petitioner returned to the Court the evidence that had been delivered by the Government to the Petitioner's counsel on January 5, 1978?

14. Did the United States Attorney commit error in falsely stating to the Court that counsel for Petitioner had stated he never received the evidence sent to him in January of 1978, or that if he did, he sent that evidence back to the Court in a sealed packet?

15. Did the Trial Court err in responding to the false statements of the United States Attorney (See No. 14 above) in stating that counsel for Petitioner had committed an unethical or illegal act and in insinuating that counsel for petitioner had misrepresented facts to the Court.

16. Did the Trial Court err in strictly limiting the scope of the cross-examination

of the government's witness, FBI Agent, Bouton, to the matters brought out on direct examination?

17. Did the Trial Court err:

A. In denying Petitioner's Requested Charge No. 1?

B. In denying Petitioner's Requested Charge No. 2?

C. In denying Petitioner's Requested Charge No. 3?

D. In denying all of Petitioner's Requested Charge No. 7, except the third paragraph thereof?

E. In denying the first paragraph of Petitioner's Requested Charge No. 11?

18. Did the Trial Court err in giving over objection of the Petitioner, the charge on aiding and abetting?



19. Considering all of the facts and circumstances surrounding the trial of this petitioner, was this petitioner given the fair and impartial trial to which he is entitled under the Constitution of the United States?

## CONSTITUTIONAL AND FEDERAL RULES INVOLVED

1. The Fifth Amendment to the Constitution of the United States. See App. p. 5.

2. Rule 611 (b) of the Rules of Evidence. See App. p. 6.

## STATEMENT OF THE CASE

This Petitioner was indicted on November 8, 1977, in a four-count indictment alleging that on four separate dates he transported certain merchandise in interstate commerce knowing that said merchandise was stolen. The Petitioner was arraigned in Brownsville, Texas, before a United States Magistrate, the Honorable William M. Mallet, on November 18, 1977. Representing the Government at the arraignment was John Patrick Smith, Assistant United States Attorney, and representing the Petitioner was J. G. Hornberger, Jr. The case was called before the Honorable Owen D. Cox, United States District Judge, on November 28, 1977, and over objection of the Petitioner, a jury was chosen on that day. Representing the Govern-



ment at the selection of the jury and the proceedings had on November 28, 1977, was Thomas P. Beery, Assistant United States Attorney, and representing the Petitioner was J. G. Hornberger, Jr. The jury was instructed to return on January 9, 1978, at which time the trial continued with the introduction of evidence. The case went to the jury on January 13, 1978, and the jury found the defendant guilty on all four counts. Representing the Government at this stage of the trial was Mr. Robert Berg, Assistant United States Attorney, and representing the Petitioner as lead counsel was J. G. Hornberger, Jr. with J. G. Hornberger, Sr. assisting.

On March 13, 1978, the Petitioner was sentenced on Count One to five years imprisonment and a $5,000.00 fine; on Count Two to five years imprisonment to run concurrent with Count One; on Count Three to five years

imprisonment to run concurrent with Counts One and Two; and on Count Four to five years imprisonment to run consecutive to Counts One, Two and Three. The Judgment and Commitment was filed March 15, 1978, and the Petitioner gave Notice of Appeal on March 17, 1978.

At the arraignment of this Petitioner on November 18, 1977, before the United States Magistrate, the following proceedings, among others, took place:

" MR. HORNBERGER: At this time the Defendant will waive reading of the indictment, and enter a plea of not guilty, and request a jury trial. If the court please, Defense would also request, if it's at all possible, to set the case after the first of the year. The defendant will be willing to waive his right to speedy trial, but it's just that our calendar is getting pretty filled up for December, at this point, we



would respectfully request that the case be set for after the first.

MAGISTRATE: Well, all I can do is give you a date for a final pretrial. It will be up to the judge that has the case to give you a trial date.

MR. HORNBERGER: I see, that'll be fine.

CLERK: This case is assigned to Judge Cox.

MAGISTRATE: Judge Cox?

CLERK: Yes, sir.

MAGISTRATE: Well, as you heard, Judge Cox will be here and he's calling all these cases on November 28th at 10 o'clock in the morning. And at that time you can ask him to set this for trial after the first of the year, and he may have enough cases where it won't make too much difference.

JOHN SMITH: He's got a bunch, Your Honor.

MAGISTRATE: I think so. Especially now, he's got some more. So be here for docket call on November 28th at 10 o'clock with Judge Cox. That'll be on the fourth floor here, and he'll tell you when to come back after that.

You can tell him whatever you've got. Now, if there are to be any motions, we need to have them here by the 28th, so he can take care of them at that time.,

MR. HORNBERGER: Yes, Your Honor.

MAGISTRATE: That gives you ten days. If you can have them here in time for the Clerk to get them in the file before he starts calling these cases."



Believing that the November 28th hearing was for Pre-trial purposes only, J. G. Hornberger, Jr., counsel for Petitioner, appeared with Petitioner and offered for filing his Motion for Discovery and Motion for Bill of Particulars. The Trial Judge found that counsel had not complied with the provisions of Rule 20 of the Local Rules for the Southern District of Texas, which provides in part that:

"Within 5 days after the arraignment, the United States attorney (or his assistant in charge of the case) and the defendant's attorney shall confer and, upon request, the Government shall: ----"

and did not permit either of said motions to be filed. He then proceeded to require the Petitioner to pick a jury, making the following statement:

"THE COURT: Well, we can at least select a jury. We do it in the Corpus Christi Division all the time, where we select a jury and set the trial date off a week or two, maybe longer. We have got a jury panel here, will be at 2:00 o'clock, and they're going to be here for jury selection." (pp. 3-5 , Tr. on Arraignment).

At that point counsel for Petitioner requested that both the jury selection and the trial be put off, since his father was to be lead counsel, but this request was denied. (p. 4 of Tr. of Nov. 28, 1977). The Court on page 5 of those proceedings then stated: "Well, we are going to go ahead with the jury selection at 2:00 o'clock this afternoon and the case will be set for trial on January 9th."



After qualifying the attorneys for the Petitioner and Mr. Beery as attorney for the Government before the Jury Panel, a jury was selected and they were told to report back on January 9, 1978. The record does not reflect if any members of this jury heard other cases in the six (6) weeks intervening between the time that they were chosen and the time the taking of testimony started. After the jury was selected, counsel for Petitioner was allowed to review the files of the United States Attorney. At that point, either Mr. Beery or Mr. Smith was to conduct the prosecution of the case. After reviewing the files, counsel for Petitioner filed an additional Motion for Discovery and on January 5, 1978, received in Laredo, Texas, a packet of documents sent to him by the Government's attorney. Apparently Mr. Robert Berg entered the case

for the Government on or about January 4, 1978, and on January 5th or 6th, 1978, by telephone advised counsel for Petitioner that one Raul Barreda, also indicted on essentially the same set of facts, would testify for the Government and would testify that the defendant, Abney, knew that the merchandise was stolen when he purchased it. Counsel for Petitioner then immediately prepared a Motion to Dismiss based essentially on the fact that all of this information contained in the packet of January 5, 1978, had been withheld from the Petitioner's counsel until such time as it would be of little use to the Petitioner. To this motion were attached copies of the original Motion for Discovery and Motion for Bill of Particulars and copies of all papers contained in the packet of January 5, 1978. This was done so that the Court could compare what was received by counsel for Petitioner on



January 5, 1978, and what he had been permitted to inspect during the month of December, 1977. A copy of Barreda's statement was furnished to counsel for Petitioner on January 9, 1978. The Government contends that on January 5, 1978, they invited counsel for Petitioner to recheck the entire Government file on Friday, January 6, 1978.

Before testimony was to be taken, on January 9, 1978, Petitioner filed a request that the following questions be asked of the jury panel:

(1) Has anything occurred since you were empaneled on November 28, 1977, to prevent you in any way from rendering a fair and impartial verdict in this case?

(2) Do you know of any reasons whatsoever why you cannot render a fair and impartial verdict in this case?

(3) Are any of you stockholders in the corporation known as Union Carbide?

The Court made the following ruling on such request:

"THE COURT: Oh, yes. I am not going to ask the three questions that you ask, but I am going to ask one question, with regard to whether or not anything has transpired since their selection that might in any way prejudice them against the Government or against the Defendant and if there is anything that might have happened which might in any way prejudice them or make it difficult for them to be fair and impartial jurors.

MR. HORNBERGER: Would, then, the third question the Defendant asked, with regard to whether or not they were stockholders--

THE COURT: That's right, that



should have been asked on the original voir dire.

MR. HORNBERGER: May the record reflect, then, that the Defendant does object?"

(See p. 46 of Tr.-1st Supp. Record on Appeal).

The jury was not qualified as to the Assistant United States Attorney, Robert Berg. The trial then proceeded. The contention of the defendant was that he was a reputable scrap dealer, that he paid for the scrap in question with a check made payable to Raul Barreda, who at the time was employed by Union Carbide Corporation as Raw Materials Coordinator and was in charge of the materials in the warehouse known as Building 700, the building where the scrap in question was stored. The Petitioner was also buying other materials and was paying for them with checks made payable to Union Carbide. The Petitioner brought the materials in question to his warehouses in Webb County

and La Salle County, Texas, processed them and ultimately sent the material by common carrier to purchasers without the State of Texas. He claims that he did not know the merchandise was stolen and that he thought that Barreda had the right to sell it for Barreda's own account. The Petitioner had no prior record of any type whatsoever and evidence of his good reputation was placed into the record.

## REASONS FOR GRANTING THE WRIT

Basically the Petitioner contends that under all the facts and circumstances his motion for continuance made on November 28, 1977, should have been granted, particularly in view of the fact that counsel for Petitioner had been informed that the November 28, 1977, hearing would be for pre-trial purposes only. The Petitioner further specifically contends that reversible error was committed by the Trial



Judge in forcing a selection of the jury on November 28, 1977, and recessing that jury until January 9, 1978, without allowing further voir-dire examination except the one question by the Court if anything had happened (during the six-week recess) that would have affected the ability of the jurors to render a fair and impartial verdict. The other basic argument of the appellant is that all of the other issues presented for review and alleged errors on the part of the Trial Court show that because of the antagonism of the Trial Judge and an overzealous assistant United States Attorney, the Petitioner was denied the fair and impartial trial to which he is entitled under the Constitution of the United States.

The Trial Court committed reversible error in denying the oral motion for continuance made by the Petitioner on November 28, 1977,

and forcing the Petitioner to trial ten (10) days after arraignment. The Magistrate made it clear at the arraignment on November 18, 1977, that November 28th was to be the date for a pre-trial, and that the Judge would set the case for trial at that time. (See p. 4 of the transcript of proceedings on arraignment.)

The Trial Judge attempted to circumvent the statement of the Magistrate that the November 28th would be a pre-trial hearing only, by stating, "Well, we are going to go ahead with the jury selection at 2:00 o'clock this afternoon and the case will be set for trial on January 9th." (See p. 5 of the Reporter's Transcript of Proceedings of November 28, 1977). Peculiarly, however, on January 9, 1978, when testimony was to be taken the Court reversed its position that the trial was to start on January 9th, and stated that "---It is now time to bring the jury in



and continue the trial of the case. This is not a new case, this is not a new setting, this is nothing but a resumption of the trial of the case that was commenced on the day the jury was selected." (See p. 36 ROA).

Further, on page 45 of the Record on Appeal, the Trial Judge states: "---and we are getting into areas that are pre-trial, and the trial started a month ago---".

The Supreme Court of the United States settled the question of when a trial begins in Hopt v People of the Territory of Utah, 110 US 576, 28 LED 262. In that case the court stated,

> "For every purpose, therefore, involved in the requirement that the defendant shall be personally present at the trial, where the indictment is for a felony, the trial commences at least from the time when the work of impaneling the jury begins."

Therefore, the Court forced a trial of this case when it was informed that lead counsel for Petitioner was not present and further when it was informed that the Magistrate had stated that the hearing on November 28, 1977, would be a pre-trial hearing only, and further when counsel for Petitioner specifically stated that he was not ready to select a jury and not ready to go to trial. It is undisputed in the record that in the afternoon of November 28, 1977, Counsel for Petitioner did state he was ready to pick the jury, but that was only because all of his motions had been overruled.

The Trial Court committed reversible error in starting the trial on November 28, 1977, by selecting a jury and then recessing the trial until January 9, 1978, six (6) weeks from the time the trial started. At the November 28th hearing



the Trial Court stated, "Well, we can at least select a jury. We do it in the Corpus Christi Division all the time, where we select a jury and set the trial date off a week or two, maybe longer." (Pages 3 and 4 of the Tr. of Proceedings of Nov. 28, 1977).

It is true in this case that the record is silent as to whether the jury selected heard other cases between November 28, 1977, and January 9, 1978, and, therefore, the case cannot be brought specifically within the ruling of the United States Court of Appeals for the Fifth Circuit in United States v Mutchler, 559 F2 955 (1977). However, the Petitioner submits that to delay the trial for a period of six (6) weeks is a fundamental or plain error as a matter of law, for there is too great a possibility of a change in the position or attitude of the jurors during such a long period of time. Their

employment can change, they can receive information which subconsciously would affect their verdict and their complete attitude towards the case could be adversely affected. This is particularly true when the Court would not permit additional voir-dire examination, but relied wholly upon the jurors word that nothing had happened in this interim six-week period that would prejudice them one way or another. (See pp. 46, 49 and 50 ROA).

The Petitioner was effectively denied his right to peremptory challenges by virtue of such a long delay and was forced to rely on the failure of a juror to orally state that something had happened that would affect his ability to render a fair and impartial verdict.

Petitioner further points out that three (3) United States Attorneys took part in the various phases of this case. Mr. Smith was at the



arraignment, Mr. Beery was at the jury selection and Mr. Berg entered the case on January 4th or January 5th and conducted the prosecution of the case during the trial. The jury was qualified as to Mr. Beery, but since Mr. Berg came into the case at a late date, and tried the case without the presence of either Mr. Beery or Mr. Smith, counsel was never permitted to qualify the jury as to Mr. Berg.

It would perhaps be unrealistic to state to this Honorable Court that any one particular of the remaining questions denied the Petitioner a fair trial. But together they show a pattern of antagonism and judicial unfairness that had to be carried over into the minds of the jury. For this reason all of these issues are argued under the one heading of the denial of a fair and impartial trial.

In United States v Bray, 546 F2 851, 10th Cir. 1976, the Court stated:

" * * * A trial judge has both great responsibility and discretion in conducting the trial of a case. He should be the examplar of dignity and impartiality. He must exercise restraint over his conduct and statements in order to maintain an atmosphere of impartiality. We are cognizant of the strain and emotional stress imposed upon a trial judge who is endeavoring to conduct the trial in a firm, dignified and restrained manner when he is confronted by a litigant who, like Bray, treats him with disrespect and who openly insults and humiliates him. Even so, it is prejudicial error for the judge to make remarks that clearly import his feelings of hostility toward the defendant. The remarks of the trial judge relative to Bray's bond, with



the inferences which must be drawn, cannot be justified or rationalized as fair and impartial. These remarks constitute plain error."

The antagonism of the Trial Judge was first revealed on November 28, 1977, and the record so reflects. The antagonism continued throughout the trial and culminated in the remarks to counsel appearing on pages 370 thru 373 of the Record on Appeal. These remarks at the bench were caused by the false statements of the United States Attorney, Mr. Berg, that, "Defense Counsel has complained that he never received them and if he did, he didn't get them in time to use and sent them back to the Court in a sealed packet dated January 5, 1978, and is now using those notes. (See p. 370 ROA).

The record reflects and the absolute facts are that the packet was received by defense counsel on January 5, 1978, in Laredo, Texas, the

material was photostated and was attached to a Motion to Dismiss because the material had been sent to the Petitioner's counsel at such a late date. The remarks by the United States Attorney came at a crucial time in the cross-examination of a crucial witness for the Government, FBI Agent, Bouton, and the conclusions of the Court based upon the false statements of Mr. Berg, the Assistant United States Attorney, sufficiently intimidated defense counsel so that effective cross-examination of that witness could not be continued. It is true that the Court apologized for his statements on the morning of January 12, 1978, the remarks having been made on January 10, 1978, and the trial having been recessed January 11, 1978. This apology appears on pages 385 thru 387 of the Transcript (ROA), and while counsel for defendant appreciate the apology, the damage had already been done and could not be cured.



It is especially submitted that the chain of custody of the government's evidence was not properly established. It is further especially submitted that giving a charge on aiding and abetting was not proper. It is further especially submitted that the Court erred in strictly limiting the scope of the cross-examination of the Government's witness, FBI Agent, Bouton, to the matters brought out on direct examination, for Rule 611 (b) of the Rules of Evidence provides as follows:

> "Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The Court may in the exercise of discretion, permit inquiry into additional matters as if on direct examination."

The antagonism of the Trial Judge carried over even into the sentencing where concurrent sentences were given on the Second and Third Counts and consecutive sentence on the Fourth County. This Petitioner had absolutely no previous record. He had an honorable military career, and his good reputation seems to have been established. But inspite of this and inspite of the fact that the employee of Union Carbide, Barreda, who sold the merchandise, was granted absolute and complete immunity, this Petitioner was given ten (10) years to serve and a $5,000.00 fine.

In Toderow v United States, 173 F2 439, 9th Cir., 1949, Writ of Certiorari denied in 337 US 925, the Court stated:

"Clearly, no one incident is sufficient to warrant reversal, and to determine



whether, in the aggregate, they adversely affected the substantial rights of the Petitioner, it is necessary to consider them in their natural and proper setting, namely, the entire record."

In United States v Steinkoenig, 487 F2 225, 5th Cir., 1973, the Court stated:

"A stricter test of harmless error must be applied if the error affected Petitioner's constitutional rights."

In United States vs Jennings, 527 F2 862 5th Cir., 1976, the Court stated:

"Justice Rutledge's classic formulation of the proper standard in Kotteakos v United States, 328 U.S. 750, 764-765, 66 S.Ct. 1239, 1248, 90 L Ed 1557, 1566-67 (1946), must direct our determination:

If, when all is said and done, the

conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand... But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

This assessment necessarily turns on the facts and circumstances of each case, United States v Ratner, 464 F2 169 (5th Cir. 1972), and must be made in light of the admonition that



an appellate court should be slow to assume that an error in the trial was inconsequential.' De-Luna v United States, 308 F2d 140, 155 (5th Cir. 1962)."

In Gomila v United States, 146 F2 372, 5th Cir. 1944, this Court stated:

"No objection was made nor was any exception taken to the court's action heretofore discussed , and the rule is invoked that the appellate courts will not consider errors urged for the first time on appeal. That these errors were committed is patent on the face of the record and, where serious injury may result, it has many times been held that it is the duty of an appellate court to notice and correct said errors even though they were not challenged during the trial."

See also United States v Eng, 241 F2 157,

2nd Cir. 1956; Braswell v United States 200 F2 597, 5th Cir. 1952 and United States v Coke, 339 F2 183, 2nd Cir., 1964.

## CONCLUSION

This Petitioner was denied the fair and impartial trial to which he is entitled under the Constitution and Laws of the United States and the case should be reversed and remanded for a new trial.

WHEREFORE, Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

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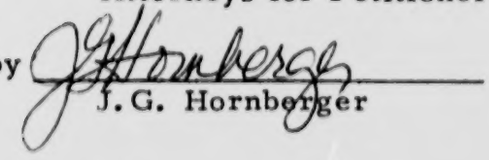
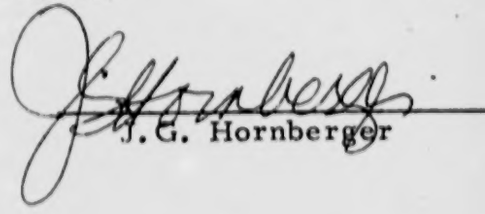
by 
J. G. Hornberger



## CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of December, 1978, two copies of Petitioner's Petition for a Writ of Certiorari were by me mailed to the United States Attorney for the Southern District of Texas, P.O. Box 61129, Houston, Texas, 77061, and three copies were on said date mailed to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530.


J. G. Hornberger

IN THE UNITED STATES COURT

OF APPEALS FOR THE FIFTH CIRCUIT

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NO. 78-5217
Summary Calendar*

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Versus

JAMES R. ABNEY, JR.,

Defendant-Appellant.

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Appeal from the United States District Court for the Southern District of Texas

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(October 26, 1978)

Before THORNBERRY, GODBOLD and RUBIN, Circuit Judges.



PER CURIAM: AFFIRMED. See Rules 21. 1/

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*Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F. 2d 409, Part I.

1/See N. L. R. B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F. 2d 966.

IN THE UNITED STATES COURT

OF APPEALS FOR THE FIFTH CIRCUIT

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NO. 78-5217

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Versus

JAMES R. ABNEY, JR.,

Defendant-Appellant.

---

Appeal from the United States District Court for the Southern District of Texas

---

ON PETITION FOR REHEARING
( November 22, 1978 )

Before THORNBERRY, GODBOLD and RUBIN, Circuit Judges.



PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

"No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without just compensation."



RULE 611 (b) of the Rules of Evidence :

"Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The Court may in the exercise of discretion, permit inquiry into additional matters as if on direct examination."

No. 78-977

# In the Supreme Court of the United States

OCTOBER TERM, 1978

JAMES R. ABNEY, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*

# In the Supreme Court of the United States

OCTOBER TERM, 1978

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No. 78-977

JAMES R. ABNEY, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that he was denied a fair trial because the jury was selected 42 days in advance of trial. Petitioner also presents 18 other questions, contending, *inter alia,* that the district court granted him inadequate time to prepare for trial, that the prosecutor engaged in misconduct, that the court erred in various evidentiary rulings, and that the instructions of the court were erroneous.

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on four counts of transporting stolen property across state lines, in violation of 18 U.S.C. 2314. He was sentenced to three concurrent terms of five years' imprisonment (counts 1 to 3) to be followed by one consecutive term of five years' imprisonment (count 4) and to a $5,000 fine (count 1). The court of appeals affirmed without opinion.

Briefly, the evidence at trial showed that petitioner, a dealer in scrap materials, knowingly purchased stolen electronic components from Raul Barreda, who was employed as the raw materials coordinator of Union Carbide Corporation. Petitioner stored the stolen merchandise in his warehouse in Texas, processed it, and shipped it to various out-of-state purchasers.

1. On November 28, 1977, the date on which the case was called for trial, petitioner and his counsel of record, Jacob G. Hornberger, Jr., appeared in the district court at the final pretrial docket call. Petitioner requested a postponement of trial until January 1978. While attempting to accommodate petitioner's request, the district court concluded that judicial economy would best be served by selecting a jury without further delay:

> Well, we can at least select a jury. We do it in the Corpus Christi Division all the time, where we select a jury and set the trial date off a week or two, maybe longer. We have got a jury panel here, will be at 2:00 o'clock, and they're going to be here for jury selection.

Nov. 28, 1977 Tr. 3-4. Petitioner's counsel requested that jury selection be deferred because his father, who was planning to serve as lead counsel at trial, could not be present that day (*id.* at 4). The court denied the motion for continuance, stating that jury selection would proceed that afternoon with a deferred trial date of January 9, 1978 (*id.* at 5). Following a *voir dire* examination conducted almost entirely by the district judge, the jury was empanelled.

Before commencement of trial on January 9, 1978, petitioner asked the district court to present the following supplemental questions to the jury (Jan. 9, 1978 Tr. 34):



> (1) Has anything occurred since you were empanelled on November 28, 1977, to prevent you in any way from rendering a fair and impartial verdict in this case?
>
> (2) Do you know of any reasons whatsoever why you cannot render a fair and impartial verdict in this case?

These questions were presented to the jury by the trial judge, with some additional explanation, as follows (*id.* at 49-50):

> Ladies and Gentlemen of the Jury, it has been several weeks since you were chosen to serve as jurors in this case and you were sworn at that time and given certain instructions with regard to discussing the case and that sort of thing.
>
> I want to ask each one of you to think back over the time since you were instructed, or at least sworn as jurors, and give that brief, introductory instruction, if there has been anything that has happened to you or that you have heard about that would in any way affect your ability to be a fair and impartial juror in the continued trial of this case. Has anything happened that—have you heard anything, talked to anybody, or is anything that you have overheard in any way made it such that you might be prejudiced one way or another or have a difficult time being a fair and impartial juror in this case?

None of the jurors indicated that anything had occurred that would interfere with the impartiality of his or her deliberations.

2. Petitioner contends (Pet. 21-28) that the district court committed error by permitting a 42-day period to intervene between the selection of the jury and the commencement of trial. However, many cases involve at least some post-selection delay, and while that delay

should be minimized where possible, this is a matter of the district court's sound discretion. Prejudice is avoided by conducting supplemental *voir dire* examination prior to trial. See, *e.g.*, *United States* v. *Price*, 573 F. 2d 356, 365 (5th Cir. 1978). The delay in this case occurred because petitioner requested a postponement of trial until January 1978. The district court, attempting to accommodate petitioner's request, was justified in going forward with the *voir dire* in order to avoid wasting the time of the jury panel that was summoned and present on November 28, 1977.

There is no indication that the procedure followed by the district court denied petitioner a fair trial. Petitioner presents no specific claim of prejudice (Pet. 26). His speculation that there may have been "a change in the position or attitude of the jurors during such a long period of time" (*ibid.*) is refuted by the response of the jury to the supplemental *voir dire* questioning. Not a single juror reported any change in attitude or an inability to render a fair and impartial verdict.[1]

3. Petitioner contends that his counsel did not have an adequate opportunity to prepare for the *voir dire*, and that a continuance should have been granted to enable counsel's father to participate (Pet. 21-28). But since the case was called for trial on that date and counsel could have had no assurance that the continuance would be granted, he presumably should have been prepared to proceed with jury selection. Indeed, petitioner's counsel had several hours to prepare for the afternoon *voir dire*,

[1]In any event, petitioner at no time sought a mistrial or otherwise objected on the ground of prejudicial delay, and he did not object to the district court's supplemental questions relating to the effect of the delay. In these circumstances, petitioner has waived his right to contest the procedure followed by the district court. See, *e.g.*, *United States* v. *Eldridge*, 569 F. 2d 319, 320 (5th Cir.), cert. denied, 436 U.S. 929 (1978).



which was conducted almost entirely by the district judge. Moreover, petitioner's counsel handled the case in all of its phases and was obviously familiar with the issues.[2] Petitioner was not prejudiced by being required to proceed with counsel of his own selection, and, in the absence of any showing that counsel's representation was rendered ineffective by the district court's ruling, the discretionary decision of the district court to deny a continuance should not be disturbed. See, *e.g.*, *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964).[3]

3. Petitioner also raises for review (Pet. 5-6) the propriety of certain remarks of the prosecutor that caused the district court to warn petitioner's counsel against unethical behavior (Jan. 9, 1978 Tr. 370-373). All of those remarks occurred at a bench conference outside of the hearing of the jury. Thus, they could not have prejudiced petitioner. See, *e.g.*, *United States* v. *Middleton*, 458 F. 2d 482, 483 (5th Cir.), cert. denied, 409 U.S. 863 (1972).[4]

4. Petitioner's assertion that he was denied a fair trial by various evidentiary rulings (Pet. 4-5) is similarly without merit. Petitioner fails to explain the basis for his contentions and fails to show any prejudice. The evidentiary rulings referred to by petitioner were within the broad discretion of the trial judge and should not be

[2]Jacob Hornberger, Jr., was listed as lead counsel at trial. He acted as counsel at the arraignment and docket call, conducted the entire trial, and argued the case to the jury.

[3]Without explanation, petitioner raises various questions for review relating to rulings of the district court on discovery matters. But petitioner has never disputed the fact that his motions for discovery were not in compliance with local court rules (see Nov. 28, 1977 Tr. 5-7). Nor has he disputed the conclusion of the district court that the materials that he sought to discover had in fact been made available to him previously (Jan. 9, 1978 Tr. 4-36).

[4]The district judge later explained that he did not intend to accuse counsel of unethical behavior and apologized for any suggestion to the contrary (Jan. 9, 1978 Tr. 370-373, 385-386).

disturbed on appeal except upon a clear showing of abuse of discretion and prejudice, which is wholly absent here. See, *e.g.*, *United States* v. *Daughtry*, 502 F. 2d 1019, 1021 (5th Cir. 1974).[5]

5. Petitioner's unexplained assertion that the district court improperly denied requested jury instructions is also without merit (see Pet. 7). Petitioner's requested instructions were actually given with only slight changes. Requested charge number 1 (Record on Appeal 38) was submitted by the court in different language (*id.* at 61, 63-65); similarly, requested charge number 2 was submitted with only a slight alteration in phraseology (*id.* at 39, 72-73); requested charge number 7 was also given in substance (*id.* at 44); and the portion of requested charge number 11 that was deleted was given elsewhere (*id.* at 48, 63-64).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
*Solicitor General*

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[5]Petitioner's claim that the district court improperly restricted cross-examination to the scope of direct examination is insubstantial. Fed. R. Evid. 611(b) authorizes this restriction.